PP v. KHAFASLIZA SHAFII

HIGH COURT MALAYA, KOTA BHARU
AHMAD BACHE JC
[CRIMINAL APPEAL NO: 42LB(A)-2-1-2016]
31 JULY 2017

CRIMINAL LAW: *Penal Code – Section 165 – Public servant received cash without consideration from contractor – Whether contractor had dealings with public servant's duty – Whether money received a donation – Whether law prohibits public servant from receiving any monies from individuals or agencies with official dealings with public servant's official work – Whether main thrust of accused's defence bare denial – Conduct of accused – Whether mala fide – Whether complainant credible witness – Whether complainant accomplice or willing participant – Whether public servant raised reasonable doubt on prosecution's case – Whether public servant found guilty – Anti Corruption Commission Act 2009, ss. 50(3), 52(1)*

CRIMINAL LAW: *Sentencing – Principles – Public interest – Whether important to impose deterrent sentence in cases of corruption – Mitigating factors – Public servant found guilty of receiving cash without consideration from contractor – Mother with no previous conviction – Amount of money involved considered – Whether long custodial sentence an option – Whether ought to be bound over for good behaviour – Criminal Procedure Code, s. 173A – Penal Code, s. 165*

The accused, a public servant, was charged under s. 165 of the Penal Court in the Sessions Court for receiving cash of RM3,000 without consideration from a contractor, which had dealings with her official duty. SP1, the complainant, was a Category F contractor and was awarded a contract by the Machang Drainage and Irrigation Department ('JPS Machang') in which the accused was working as an assistant engineer. SP1 received a call from the accused that SP1 was awarded a project through an indent valued at RM19,450 from the Director of JPS and that she was to avail herself at JPS Machang to collect the letter of acceptance. As directed, SP1 went to JPS Machang and the accused told SP1 'duit saya ada dalam tu RM3,000'. According to SP1, she understood the aforesaid statement to mean that the accused was to get an amount of RM3,000 from the whole sum awarded under the contract for the works as this was normal of her to ask the same on previous occasions for previous projects. In the course of her works, SP1 submitted that the accused had persistently asked for the RM3,000, and had even said that the Director of JPS requested for the RM3,000. As SP1 could not bear the persistent demand of the accused, SP1 went to the Malaysian Anti-Corruption Commission ('MACC') to lodge a formal report. Following the report, a telephone conversation between SP1 and the accused was

recorded by SP5, an officer from MACC, where it was evident that the accused had demanded from SP1 the RM3,000. When SP1 received the payment for the completed works, she deposited RM3,000 into the bank account of the accused. SP1 then informed the accused that the money had been deposited and the accused had replied 'terima kasih Kak Dah duit itu tak sempat untuk hantar ke JPS Kota Bharu'. The accused was later arrested and charged. At the end of the trial at the Sessions Court, the judge found that the accused had successfully raised a reasonable doubt in the prosecution's case primarily on the finding that the RM3,000 received by the accused was not for herself but as a donation to Kelab Sukan/PUSPANITA club. The accused was thus acquitted and discharged. Dissatisfied, the Public Prosecutor filed an appeal before this court.

Held (allowing appeal):

(1) Section 165 was introduced in the Penal Code to curb and to prevent public servants from receiving any gifts without consideration from anybody who has any official dealings with that public servant. Holistic and practical approaches should be embarked in assessing the conduct of the accused in pinning her culpability, so as not to frustrate the very *raison détre* of this penal section. Had the judge held and turned over in his mind the rationale for this kind of offence, his decision would have been different. (paras 61 & 62)

(2) The judge erred in coming to a conclusion that the money was for donation, regardless of whether it be for the Kelab Sukan or the Puspanita Club, and not for the accused against the strong totality of the whole evidence of the prosecution that had proved otherwise. In view that the presumption under s. 50(3) of the Anti-Corruption Commission Act 2009 ('ACCA') had been invoked and applied, the burden was shifted on to the accused to disprove otherwise, which she had failed to do. The judge erred in coming to the conclusion in the manner that he did, and thereafter to have acquitted and discharged the accused. (paras 49 & 50)

(3) The main thrust of the accused's defence was a bare denial which had failed to dislodge the cogent case of the prosecution. The accused denied that the RM3,000 was for her, but as donation to Kelab Sukan, which was in total contradiction with the evidence of witnesses who confirmed that the club had at no time ask for donations from contractors. Furthermore if at all it was for the club, she should have given the club's account number instead of her personal account number. As a public servant, she should be aware of the directives, or circulars, that no public servants should take, or receive any donations from any person, including any contractors for him or herself, or for any club in which

he or she belonged. She should be aware that the law prohibits her from receiving any monies from any individuals or agencies which had any official dealings with her official work. Ignorance of the law is no excuse. (paras 63-69)

(4) Against the denial of the accused, much evidence was led by SP1 that the accused was the one who telephoned SP1 to collect the relevant documents. SP1 had gone to JPS Machang as instructed by the accused and it was during this time that the accused demanded the RM3,000 for herself. SP1's assertion that she met the accused to collect the documents on that day from the accused was proved, the evidence of which was therefore true against the denial made by the accused. The accused had also implicated that the money was for the Director of JPS, which begged another question that if at all the money was for donation, why did she have to say that it was for the Director. This, in itself, showed that the money was for her. (paras 71-74)

(5) The conduct of the accused was relevant and admissible under s. 8 of the Evidence Act 1950. From the conduct of the accused in not asking SP1 to bank into the Kelab Sukan account and not informing the committee members of both the Kelab Sukan or the Kelab Puspanita of the receipt of the RM3,000, a compelling inference that this court must draw was that the money in question was actually for her as contended by SP1 and not as a donation for Kelab Sukan or the Kelab Puspanita. The accused's allegation in telling SP1 that the money was for the Director was another conduct that was a testimony of her *mala fide* act to implicate others to escape detection. (paras 75-79)

(6) SP1 was a credible witness and her evidence was more probable than the denial of the accused whose own credibility was at stake. SP1's evidence was corroborated by the MACC report and by the telephone conversation she had with the accused which confirmed that there was a mention of the money demanded and the amount was actually suggested by the accused. The accused was therefore not telling the truth. By virtue of s. 52(1) of the ACCA, SP1 could not be treated as an accomplice and she was not a willing participant (paras 81, 82 & 93)

(7) The defence failed to rebut the presumption, on a balance of probability, that the accused accepted the money without consideration, with full knowledge of the circumstances as set out in the charge against her. The accused had failed to raise a reasonable doubt on the prosecution's case as the defence was a mere denial, with some afterthought evidence. Accordingly, the accused was found guilty. (para 95)

(8) The accused was a wife, a mother of college and school-going children and had no previous conviction. The amount of money involved was only RM3,000. She would also lose her job due to this conviction recorded against her. Hence, this court was of the considered opinion that neither a bound over for good behaviour under s. 173A of the Criminal Procedure Code, nor a long custodial sentence should be the option. The accused was thus sentenced to one week imprisonment with a fine of RM15,000 in default 8 months' imprisonment. (paras 100-102)

Case(s) referred to:
Baharudin Ahmad v. PP [2010] 3 CLJ 59 HC ***(refd)***
Balachandran v. PP [2005] 1 CLJ 85 FC ***(refd)***
Brabakaran v. PP [1965] 1 LNS 12 FC ***(refd)***
Dato' Seri Anwar Ibrahim v. PP & Another Appeal [2004] 3 CLJ 737 FC ***(refd)***
Haji Abdul Ghani Ishak & Anor v. PP [1981] 1 LNS 96 FC ***(refd)***
Kanapathy v. Regina [1960] 1 LNS 167 ***(refd)***
Ku Yahya v. Bahri [2002] 1 CLJ 113; [2000] 3 CLJ 162 ***(refd)***
Lim Guan Eng v. PP & Other Appeals [1998] 3 CLJ 769 CA ***(refd)***
Loo Choon Fatt [1976] 1 LNS 102 HC ***(refd)***
Looi Kow Chai & Anor v. PP [2003] 1 CLJ 734 CA ***(refd)***
Mat v. PP [1963] 1 LNS 82 HC ***(refd)***
Mohd Khir Toyo v. PP [2015] 8 CLJ 769 FC ***(refd)***
Mohd Radzi Abu Bakar [2006] 1 CLJ 457 FC ***(refd)***
Png Hun Sun v. Dato' Yip Yee Foo [2013] 1 LNS 320 CA ***(refd)***
PP v. Dato Waad Mansor [2005] 1 CLJ 421 FC ***(refd)***
PP v. Dato' Harun Idris (No. 2) [1976] 1 LNS 184 ***(refd)***
PP v. Dato' Seri Anwar Ibrahim (No. 3) [1999] 2 CLJ 215 HC ***(refd)***
PP v. Mohd Noor Yusof [2008] 7 CLJ 504 HC ***(refd)***
PP v. Mohd Rosidi Mat Amin [2015] 6 CLJ 511 HC ***(refd)***
PP v. Tan Hock Sing [1962] 1 LNS 136 HC ***(refd)***
PP v. Yuvaraj [1968] 1 LNS 116 PC ***(refd)***
Prasit Puyang v. PP [2014] 7 CLJ 392 CA ***(refd)***
R v. Ball 35 CR App 164 ***(refd)***
State v. Pundlik Bhikaji Ahire And Anr AIR 1959 Bom 543 ***(refd)***
Tan Sri Abdul Rahim Mohd Noor lwn. PP [2001] 1 CLJ 645 HC ***(refd)***
Yan Wing Lee v. PP [1994] 2 CLJ 453 HC ***(refd)***

Legislation referred to:
Criminal Procedure Code, s. 173A
Evidence Act 1950, s. 8
Malaysian Anti-Corruption Commission Act 2009, ss. 3, 50(1), (3), 52(1)
Penal Code, s. 165

Other source(s) referred to:
Dr Sir Hari Singh Gour, *The Indian Penal Law*, India, p 1151
Malal Penal Law, p 260, para 1651
Ratanlal & Dhirajlars Law of Crimes, pp 740, 774

For the appellant - Shahidah Muslimah Roslan; DPP
For the respondent - Zainal Abidin Mustaffa; M/s Zainal & Mariani

Reported by Suhainah Wahiduddin

JUDGMENT

Ahmad Bache JC:

Background

[1] The accused/respondent, a public servant, was charged under s. 165 of the Penal Code in the Sessions Court below, for receiving cash of RM3,000 without consideration from a contractor, which had dealings with her official duty.

[2] At the end of the defence case, she was acquitted and discharged by the learned Sessions Judge. Dissatisfied, the Public Prosecutor filed an appeal before this court.

[3] Having heard the submissions by both parties, this court found her guilty, set aside the finding of the learned Sessions Judge, convicted her and sentenced her to one week imprisonment and a fine of RM15,000 in default eight months imprisonment.

[4] Dissatisfied, the accused/respondent filed a notice of appeal to the Court of Appeal, on both conviction and sentence.

[5] These are the grounds of the judgment of this court.

[6] For the record, the prosecution had called 16 witnesses whilst the defence called ten witnesses including the accused/respondent.

The Charge

[7] The charge against the accused/respondent was as follows:

> Bahawa kamu pada 16 Disember 2012 jam lebih kurang 4.38 petang di Bank Islam Malaysia Berhad Cawangan Kota Bharu, Jalan Sultan Yahya Petra, dalam Jajahan Kota Bharu, di dalam Negeri Kelantan, sebagai penjawat awam, iaitu Penolong Jurutera Gred J29 yang bertugas di Jabatan Pengairan Dan Saliran Jajahan Machang, telah menerima untuk diri kamu suatu benda berharga, iaitu wang tunai RM3,000 dengan tiada balasan daripada Wan Zubaidah binti Wan Abdullah melalui akaun Bank Islam Berhad No. 03018020432474 yang kamu tahui ada hubungan dengan tugas rasmi kamu sebagai penjawat awam di mana kamu sebagai Pegawai Penyelia Kerja bagi Kerja-kerja Kecil Menaiktaraf Sistem Saliran Serta Kerja-kerja Berkaitan di Kampung Panggung, Bagan 3, Machang, Kelantan dan dengan itu kamu telah melakukan kesalahan di bawah seksyen 165 Kanun Keseksaan dan boleh dihukum di bawah peruntukan seksyen yang sama.

The Brief Facts Of The Case

[8] SP1, the complainant at all material times was a "Kelas F" (category F) contractor, of which she may be awarded contracts of not more than RM200,000 by the government agencies. A contractor for more than 27 years, SP1 had successfully been awarded many contracts by the Public

Works Department (Jabatan Kerja Raya) ("JKR") and in this instant case by the Machang Drainage and Irrigation Department (Jabatan Pengairan dan Saliran Machang ("JPS Machang") in which the accused/respondent was working as an assistant engineer, also known as technical assistant ("TA").

[9] On 4 October 2012, SP1 received a call from the accused/respondent that SP1 was awarded a project through an indent (inden kerja) titled "Kerja-kerja Menaikkan Sistem Saliran Serta Kerja-Kerja Berkaitan di Kampung Bagan 3, Machang, Kelantan" valued at RM19,450 from the Director of JPS. Further, she was to avail herself at JPS Machang on Sunday, 14 October 2012 to collect the indent marked as exh. P5, P6 (bill of quantities) and P7 (letter of acceptance) (See appeal record vol. 6, pp. 1048-1050) and the evidence of SP1 at pp. 21 to 26, of the appeal record.

[10] According to SP3, En Wan Azinuddin, the district engineer, as an assistant engineer, the accused/respondent headed the technical unit of JPS Machang, and was directly involved in projects awarded to contractors. In this case, the accused/respondent was the officer responsible for the proposal and selection of SP1 as the contractor for the project and approved by SP3 because of the good track record of SP1's works performance.

[11] Thus, as the supervising officer of the project, the accused/respondent was responsible for giving all the required information of the works to be done (see P5, appeal record at p. 1048) and who confirmed that the works was done and completed satisfactorily by SP1.

[12] On 14 October 2012, as directed, SP1 went to the JPS Machang to collect those documents (P5, P6 & P7) from the accused/respondent. The accused/respondent told SP1 "duit saya ada dalam tu RM3,000" (translated to mean "My share of RM3,000 is in it"). According to SP1, she understood the aforesaid statement to mean that the accused/respondent was to get an amount of RM3,000 from the whole sum awarded under the contract for the works as this was normal of her to ask the same on previous occasions for previous projects. SP1 then replied "beres" (translated to mean "done") (See appeal record p. 24).

[13] According to SP1, she told the accused/respondent that she would give the RM3,000 after she had received the money on payment of the completion of the entire works. SP1 added that in the course of the works, the accused had persistently asked for the RM3,000 to which she repeated the same answer that she would give upon payment of the completion of the entire works, the reason being that she did not have the RM3,000. Three days later, the accused/respondent called again and said the director of the JPS wanted the money. A week later, again the accused/respondent called to say that the director of JPS requested for the RM3,000 as he wanted that money to go to Indonesia.

[14] The director of the JPS, Dato' Mat Rahim Ismail, was called by the prosecution as SP2. He denied ever asking for the money. He confirmed that his trip to Indonesia was an official one, and that it was fully paid by the federal government and not from contribution from contractors (see p. 99 of the appeal record).

[15] As SP1 could not bear the persistent demand of the accused/respondent for the RM3,000, on 5 December 2012, SP1 finally went to the Kelantan branch of the Malaysian Anti-Corruption Commission (MACC) to lodge a formal report as contained in the exh. P8.

[16] Following the report, on 11 December 2012, a telephone conversation between SP1 and the accused/respondent was recorded by SP5 (MACC officer). It was evident in the recording that when SP1 asked about the amount which the accused/respondent demanded, the latter without hesitation said "tiga". In the conversation SP1 did request for a lesser amount to which the accused/respondent replied that it was for the director, and that he actually had asked for a bigger amount.

[17] When SP1 received the payment for the completed works, she informed the accused/respondent, and asked for her account number. The accused/respondent gave her account number at Bank Islam and on 16 December 2012 after withdrawing RM3,000 from her account, SP1 deposited the same into the Bank Islam account of the accused/respondent.

[18] SP1 then informed the accused/respondent that RM3,000 was deposited into her account. The accused/respondent replied "terima kasih Kak Dah duit itu tak sempat untuk hantar ke JPS Kota Bharu".

[19] The accused/respondent was later arrested and charged on the following day ie, 17 December 2012.

The Law

[20] Section 165 of the Penal Code ("the PC") reads as follows:

> Whoever, being a public servant, accepts or obtains, or agrees to accept or attempts to obtain, for himself, or for any other person, any valuable thing without consideration, or for a consideration which he knows to be inadequate, from any person whom he knows to have been, or to be, or to be likely to be concerned in any proceeding or business transacted or about to be transacted by such public servant, or having any connection with the official functions of himself or of any public servant to whom he is subordinate, or from any person whom he knows to be interested in or related to the person so concerned, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

[21] This offence must also be read with s. 50(3) of the Malaysian Anti-Corruption Commission Act 2009 (Act 694) which reads as follows:

> (3) Where in any proceedings against any person for an offence under section 165 of the Penal Code it is proved that such person has accepted or attempted to obtain any valuable thing without consideration or for a consideration which such person knows to be inadequate, such person shall be presumed to have done so with such knowledge as to the circumstances as set out in the particulars of the offence, unless the contrary is proved.

[22] Section 165 of the Penal Code comprises the following elements, namely, that:

(i) The accused is a public servant at the material time;

(ii) The accused received valuable thing i.e. cash of RM3,000;

(iii) The accused received the money without any consideration and;

(iv) The accused knew that the giver had official dealings with him/her.

Findings Of The Sessions Judge

[23] The learned Sessions Judge found that the prosecution had successfully proved all the ingredients of the offence, and that a *prima facie* case was successfully established by the prosecution.

[24] There were two highly contentious ingredients which are required to be proved by the prosecution ie, that the accused received the RM3,000, and that it was received by her without any consideration, of which the learned Sessions Judge made a finding of fact that the accused/respondent did receive the RM3,000 which was paid through the cash deposit machine (CDM) into the account of the accused/respondent.

[25] The learned judge agreed that the money was as a "gift" for the "indent" work that was awarded to SP1. The learned judge also agreed that even though the accused/respondent had no power (under the procurement procedure laid down by the Government) to award the contract of works, she had a big role in the award process as she was the head of the technical unit.

[26] This was what the learned judge said at p. 995 of the appeal record:

> Peguambela Tertuduh telah membangkitkan bahawa Tertuduh tiada kuasa untuk memberi kelulusan terhadap kerja-kerja inden dan sebagai implikasi, tiada sebab untuk Tertuduh meminta wang daripada SP1 kerana memberikan kerja-kerja tersebut. Walau bagaimanapun daripada keterangan Jurutera Daerah (SP3), didapati bahawa Tertuduh adalah Ketua Unit Teknikal di JPS, Machang dan beliau terlibat secara khusus di dalam kerja-kerja sebut harga dan inden. SP1 sebagai Ketua Unit Teknikal dipertanggungjawabkan untuk mengenalpasti senarai-senarai kerja yang akan dilaksanakan dan pemilihan kontraktor adalah di atas cadangan Tertuduh kepada SP3 di mana kebiasaannya cadangan ini akan

diterima oleh SP3. Disebabkan sudah lama bekerja di JPS Machang dan kenal kontraktor-kontraktor di situ termasuk SP1, maka mudah bagi Tertuduh untuk mencadangkan nama SP1 bagi melaksanakan kerja-kerja inden.

[27] The learned judge also accepted the evidence of SP1 that the accused/respondent demanded the money and the same was deposited into the accused/respondent's bank account which was supported by documentary evidence, ie, the MACC Report lodged by SP1 (exh. P8); the telephone conversation between SP1 and the accused/respondent which was transcribed (exhs. P22A and P22B), together with its forensic report (exh. P41).

[28] At p. 996 of the appeal record, the learned judge said:

Mahkamah mendapati bahawa keterangan SP1 mengenai terdapat perbualan di antara beliau dan Tertuduh yang meminta beliau memasukkan wang RM3,000 ke dalam akaun peribadinya dan Tertuduh telah menerima wang sebanyak RM3,000 daripada beliau itu telah disokong oleh keterangan saksi dokumentari, iaitu aduan rasmi P8 dan rakaman percakapan telefon di antara Tertuduh dan SP1 yang telah dibuat dan transkripsi perbualan itu telah dikemukakan di Mahkamah sebagai P22A dan P22B. Keterangan Pegawai-Pegawai Forensik juga telah menunjukkan, bahawa perbualan telefon itu disahkan daripada telefon-telefon milik Tertuduh dan telefon milik SP1. Laporan Forensik telah dikemukakan di Mahkamah ini dan diekshibitkan sebagai P41. Peguambela Tertuduh telah membangkitkan berkenaan dengan rakaman perbualan yang tidak jelas dan pegawai yang menterjemahkan rakaman perbualan tersebut adalah tidak mahir di dalam loghat Kelantan. Mahkamah mendapati bahawa rakaman percakapan tersebut adalah keterangan sokongan dan dakwaan pihak Tertuduh tersebut tidak menjejaskan keseluruhan kes pendakwaan. Peruntukan seksyen 3 Akta Keterangan dan kes-kes *PP v. Mohd Azmi Ibrahim & Satu Lagi* [2012] 1 LNS 1284, *Gnanasegaran Pararajasingam v. PP* [1997] 4 CLJ dan Mohd All Jaafar b PP [1998] 2 MLJ 201 yang dirujuk oleh pihak pendakwaan adalah berkaitan.

[29] The learned judge further agreed that the money was received by the accused/respondent without any consideration because SP2, who was the director of JPS, Kelantan denied that he was the one who demanded the money. SP1's evidence was further supported by SP3, SP2 and witnesses from PUSPANITA and KELAB SUKAN that was SP4, SP11 and SP10 respectively.

[30] At pp. 996 and 997, the judge further stated that:

[34] Mahkamah mendapati bahawa pihak pendakwaan telah berjaya membuktikan intipati ketiga pertuduhan iaitu Tertuduh menerima barang tersebut tanpa balasan, daripada keterangan SP1 yang menyatakan bahawa Tertuduh telah meminta duit RM3,000 kerana memberi SP1 projek berharga RM19,450.00. Ini disokong oleh keterangan Pengarah JPS

Negeri Kelantan, SP2 yang menafikan beliau ada meminta wang RM3,000 daripada kontraktor untuk membiayai tiket kapal terbang beliau ke Indonesia. Menurut SP2 lawatan beliau ke Indonesia adalah menggunakan peruntukan Kerajaan Persekutuan dan SP2 turut mengatakan bahawa untuk apa-apa program JPS, pihaknya menggunakan peruntukan yang sedia ada dan tidak menerima apa-apa sumbangan daripada kontraktor-kontraktor. Mahkamah juga merujuk kepada keterangan saksi-saksi lain seperti keterangan SP3, iaitu Jurutera Jajahan, SP4 dan SP11 dari PUSPANITA dan SP10, Bendahari Kelab Sukan dan Kebajikan JPS yang merupakan keterangan sokongan, yang menyokong fakta kes pendakwaan bahawa Kelab Sukan JPS tidak menerima sumbangan daripada kontraktor-kontraktor untuk menjalankan program-programnya kerana PUSPANITA dan Kelab Sukan JPS mempunyai akaun yang tersendiri dan Tertuduh tidak pernah diarahkan untuk menerima sumbangan daripada mana-mana kontraktor termasuklah SP1. Daripada keterangan tersebut didapati bahawa pendakwaan telah berjaya membuktikan bahawa wang RM3,000 tersebut diterima oleh Tertuduh tanpa apa-apa balasan, bukan untuk kegunaan Jabatan, melainkan kegunaannya sendiri.

[31] In respect of the fourth ingredient, the learned judge agreed that the accused/respondent knew that the giver had official dealings with her when he said at p. 999, thus:

Daripada keterangan saksi-saksi pendakwaan, didapati bahawa Tertuduh sememangnya mengetahui bahawa SP1 mempunyai hubungan rasmi dengan beliau. Beliau selaku Pembantu Teknik dan Pengerusi Unit Teknikal kenal kontraktor-kontraktor di dalam bidangkuasa JPS Machang dan syornya kepada Jurutera Jajahan biasanya akan diterima. Tertuduh juga tahu beliau mempunyai kuasa kerana sejak pertemuan pada 14.10.2012 tersebut, Tertuduh telah memberikan dokumen-dokumen kerja-kerja inden, iaitu P5, P6, dan P7 yang menunjukkan bahawa SP1 adalah kontraktor yang menerima projek tersebut.

[32] Regarding the credibility of SP1/complainant, the learned judge appeared to agree that she was a credible witness albeit he did not say that directly when he said at p. 997, that:

[35] Pihak Tertuduh telah menarik perhatian Mahkamah kepada keterangan SP1 yang dikatakan bercanggah dan tidak boleh dipercayai. Di antara lain Tertuduh merujuk kepada tarikh-tarikh SP1 datang mengambil dokumen-dokumen inden yang dikatakan bercanggah, SP1 mengatakan tidak pernah memberi apa-apa sumbangan kepada Kelab Sukan JPS Machang dan tidak pernah hadir program-program yang dianjurkan oleh Kelab tersebut dan juga keterangan SP1 yang Menteri suruh JPS Machang membuat bayaran sedangkan tiada peruntukan. Mahkamah mendapati bahawa apa yang diperkatakan oleh Tertuduh (actually SP1) itu bukan "material discrepancies" tetapi "minor disparities" yang tidak menjejaskan kes pendakwaan. Mahkamah merujuk kepada kes-kes *Pie bin Chin v. PP* [1985] 1 MLJ 234 dan *PP v. Datuk Hj Harun bin Haji Idris*

(No. 2) [1977] 1 MLJ 15 mengenai "minor disparities" di dalam keterangan bukanlah sesuatu yang boleh menjadi alasan untuk mengatakan seseorang saksi itu tidak boleh dipercayai."

[33] The learned judge also agreed that the evidence of SP1 was corroborated by SP2, SP3 SP4 and SP11 (at pp. 998 of the appeal record).

[34] In coming to the conclusion that a *prima facie* was successfully proved by the prosecution, the learned judge said at p. 999 of the appeal record that:

Mahkamah merujuk kepada peruntukan Seksyen 50(3) Akta SPRM 2009 yang menyatakan bahawa di dalam mana-mana prosiding terhadap Tertuduh di bawah Seksyen 165 Kanun Keseksaan telah dibuktikan bahawa dia telah menyetujui terima, atau cuba untuk memperolehi apa-apa benda berharga tanpa balasan yang Tertuduh tahu ia adalah tidak memadai, maka Tertuduh tersebut hendaklah dianggap telah berbuat demikian melainkan jika dibuktikan sebaliknya. Mahkamah merujuk kepada kes Attan bin Abd Ghani v PP [1970] 1 MLJ 143 mengenai membangkitkan anggapan statutori di dalam keadaan ini. Maka berdasarkan keterangan saksi-saksi pendakwaan, Tertuduh dianggap telah menerima RM3,000 tersebut tanpa balasan daripada SP1 melainkan Tertuduh dapat membuktikan kepada Mahkamah bahawa wang tersebut adalah sumbangan daripada SP1 untuk JPS Negeri Kelantan.

Keputusan Mahkamah di akhir kes Pendakwaan

[38] Setelah mendengar keterangan saksi-saksi di dalam kes pendakwaan, melihat ekshibit-ekshibit yang dikemukakan, membaca penghujahan pihak-pihak, serta menilaikan semua keterangan yang dikemukakan dengan penilaian yang maksima, Mahkamah memutuskan bahawa pihak pendakwaan telah berjaya membuktikan semua elemen-elemen pertuduhan di bawah seksyen 165 Kanun Keseksaan iaitu: (i) Tertuduh adalah penjawat awam; (ii) Tertuduh telah menerima suatu barang berharga; (iii) Tertuduh menerima barang tersebut tanpa balasan; (iv) Tertuduh mengetahui bahawa pemberi barangan tersebut mempunyai hubungan dengan tugas rasmi tertuduh, maka dengan yang demikian pihak pendakwaan telah berjaya membuktikan satu kes *prima facie* terhadap tertuduh dan tertuduh adalah dipanggil untuk membela diri terhadap pertuduhan.

[35] In her defence, the accused/respondent elected to give evidence on oath. The defence of the accused/respondent was that of a bare denial. She denied that she was involved in the giving of tenders/contracts at JPS Machang, and countered that such matters were in the hands of the district engineer (JJ) (SP3), or JPS Director of Kelantan (SP2). The learned judge observed at pp. 1001 of the appeal record:

[40] Tertuduh di dalam keterangannya mengatakan bahawa beliau tidak terlibat di dalam pemberian tender di JPS Machang. Menurut Tertuduh pemberian kerja-kerja tender di bawah RM20,000.00 di bawah kuasa Jurutera Jajahan dan bagi yang bernilai Iebih daripada RM20,000.00 adalah di bawah kuasa Pengarah JPS Negeri Kelantan. Tertuduh

menjelaskan bahawa semasa beliau di JPS Machang kontraktor-kontraktor akan berjumpa sendiri dengan Jurutera Daerah untuk mendapatkan inden kerja dan setelah seseorang kontraktor itu berjaya mendapatkan projek, Jurutera Jajahan sendiri akan mengeluarkan "Letter of Acceptance" kepada kontraktor berkenaan.

[36] The learned judge observed that in her testimony the accused/respondent testified that the technician, Shamsul Mahadi was tasked to visit the site and to monitor the works and would make progress reports of the works, complete with photographs, at a fixed regular interval. Upon receipt of the reports, only then the accused/respondent would hand over the same to the district engineer and his technician, and that her role as an assistant engineer are more towards preparation and completion of reports only (See p. 1002 of the appeal record).

[37] With regards to this contract of works, the learned judge observed at pp. 1002 and 1003 of the appeal record:

[43] Untuk projek yang menjadi subjek pertuduhan ini, iaitu "Projek Kerja-Kerja Menaiktaraf Sistem Saliran Serta Kerja-Kerja Berkaitan di Kampung Panggung, Bagan 3, Machang, Kelantan," seperti dokumen-dokumen P5,P6, P7 dan P17 Tertuduh mengatakan bahawa beliau tidak terlibat. Tertuduh mengatakan bahawa P12 yang berkaitan dengan projek tersebut disediakan oleh Puan Ruzaimun (SP7). Juruteknik yang dilantik di dalam projek tersebut ialah Encik Shamsul Mahadi. Tertuduh mengatakan bahawa beliau tidak perlu membuat lawatan tapak projek dan segala-segala yang berkaitan dengan dokumentasi bagi projek tersebut dikendalikan oleh SP7. Tugas Tertuduh adalah membuat pengesahan bahawa projek ini telah diberikan kepada kontraktor yang berkenaan dan untuk mengesahkan projek disiapkan sepenuhnya oleh kontraktor tersebut."

[38] The learned judge further observed that the accused denied giving the documents marked as exhs. P5, P6 and P7 to SP1 but it was a person by the name of Kak Mun who gave them because Kak Mun kept those documents. The learned judge said, at pp. 1005 and 1006 of the appeal record, that:

[47] Mengenai penyerahan dokumen-dokumen bagi kerja-kerja inden kepada SP1, Tertuduh mengatakan bahawa dokumen-dokumen itu tidak diserahkan oleh beliau tetapi Kak Mun yang menyerahkanya kepada SP1 kerana dokumen-dokumen itu memang disimpan oleh Kak Mun. Tertuduh menafikan daripada 17 Oktober 2016 sehingga 4 Disember 2012 beliau ada berhubung dengan SP1. Menurut Tertuduh beliau hanya berjumpa dengan SP1 pada 4 Disember 2012 di mana pada tarikh tersebut SP1 telah hadir ke pejabat JPS Machang untuk bertanya kepada Kak Mun samada bayaran telah dapat ataupun belum. Tertuduh mengatakan bahawa pada masa itu beliau telah melihat SP1 berada di bilik Kak Mun yang berdekatan dengan bilik Tertuduh. Menurut Tertuduh, selepas itu SP1 telah singgah sebentar di bilik beliau dan SP1 telah memaklumkan kepada Tertuduh bahawa kehadirannya ke pejabat JPS Machang pada hari itu adalah untuk menyemak bayaran projek dan semasa itu Tertuduh

telah memberitahu SP1 dengan nada bergurau, "bolehlah bagi sumbangan kepada pejabat." SP1 telah menjawab dengan nada marah, "bila nak dapat sumbangan mintak pada kita, tapi bila nak bagi projek tak dapat nak adjust bayaran." Tertuduh mengatakan beliau tidak pernah meminta wang daripada SP1.

[39] The learned judge also observed and noted at p. 1006 of the appeal record that the accused/respondent testified that the contents of P8 (the SPRM report) was not true. The accused/respondent also said that it was SP1 who called her first to inform her that SP1 wanted to give donation to her office (JPS Machang). The accused/respondent informed SP1 that she was not in Kota Bharu and if SP1 wanted to give the donation, SP1 could give her at her office as usual when she came back to work. SP1 later said that it was all right and that she would wait for the accused/respondent to come back to office.

[40] The learned judge also observed (see p. 1007 of the appeal record) that the accused/respondent denied the contents of P22A, ie, the transcripts of the telephone conversations, and that she demanded the money from SP1, but instead alleged that SP1 had telephoned her to say that SP1 wanted to give donation to the office of the accused/respondent.

[41] The learned judge also observed and noted (see p. 1003 and 1004 of the appeal record) that it was common for Kelab Sukan Machang to receive donations from contractors. Further, the accused/respondent was an active member of PUSPANITA Club, and that as the Economic Bureau Head, she was tasked to increase the fund for PUSPANITA, and the funds were derived from the contributions of contractors. In short, the learned judge ruled that the money in question was received by the accused/respondent not for herself but as donation for Kelab Sukan or the PUSPANITA Club.

[42] At the end of the trial, after considering the case in totality, the learned judge found that the accused/respondent had successfully raised a reasonable doubt in the prosecution's case primarily on the finding that the RM3,000 received by the accused/respondent was not for herself but as a donation to Kelab Sukan/PUSPANITA Club. According to the learned judge, this was justified by the fact that (contrary to the prosecution's evidence), there were insufficient funds to implement the programs and activities of both the clubs.

Analysis And Findings Of This Court

On Prima Facie

[43] It is trite that this court is to subject the case of the prosecution to a maximum evaluation of the evidence of all their witnesses at the end of the prosecution's case. This exercise necessarily involves subjecting all the evidence of the prosecution witnesses (including weighing that of the credibility of its witnesses) to strict scrutiny (*Mohd Radzi Abu Bakar* [2006] 1 CLJ 457, *Balachandran v. PP* [2005] 1 CLJ 85, *Looi Kow Chai & Anor v. PP* [2003] 1 CLJ 734 dan *PP v. Dato' Seri Anwar Ibrahim (No. 3)* [1999] 2 CLJ

215). If there are any infirmities in the prosecution's case, then the benefit of the prosecution's failure should be given to the defence. Hence, this court too had applied the aforestated principles in its analyses which it carried out to determine if a *prima facie* case had been made out at the end of the prosecution's case.

[44] Suffice to say that this court was satisfied that the trial judge had put the prosecution case to strict scrutiny by subjecting all the evidence of the prosecution to a maximum evaluation, and hence agreed with the finding of the trial judge that the prosecution had successfully made out a *prima facie* case. The learned judge had carried out the requisite judicial analyses in arriving at the correct finding. Hence, in this regard this court was satisfied that all the elements of the charge were successfully proved by the prosecution.

The Defence

[45] This court had thoroughly perused and critically analysed the defence case too. In doing so, this court had subjected the prosecution case to a maximum evaluation. Thereafter, this court had tested the defence evidence with that of the evidence of the prosecution to determine which evidence was more probable, and to finally determine whether that probability can raise a reasonable doubt on the prosecution's case in accordance with the well-established principle as laid down in *Mat v. PP* [1963] 1 LNS 82; [1963] MLJ 263 (See also the case of *PP v. Mohd Rosidi Mat Amin* [2015] 6 CLJ 511, *Prasit Puyang v. PP* [2014] 7 CLJ 392.

[46] In addition, as this case was investigated by the MACC, hence the presumption under s. 50(3) of Act 694 applies as the presumption is a presumption of law and it is obligatory for the court to raise it. The burden of proof then shifts to the Defendant to rebut such presumption on a balance of probabilities, which is a burden heavier than the burden of casting a reasonable doubt on the prosecution's case. (See *Ku Yahya v. Bahri*; *PP v. Mohd Noor Yusof* [2008] 7 CLJ 504 and *PP v. Yuvaraj* [1968] 1 LNS 116; [1969] 2 MLJ 89).

[47] It must be mentioned at the outset here that whilst in an appeal the appellate court should be slow in interfering the finding of fact of the trial judge, however the appellate court can interfere if the finding of fact by the trial judge was plainly wrong as it goes against the weight of evidence, or by reasons of misdirection or non-direction, amongst others. This was clearly stated in the Court of Appeal's case in *Png Hun Sun v. Dato' Yip Yee Foo* [2013] 1 LNS 320 where the court said:

> The findings of fact of the trial judge can only be reversed when it is positively demonstrated to the appellate court that:
>
> (a) by reason of some non-direction or mis-direction or otherwise the judge erred in accepting the evidence which he or she did accept; or

(b) in assessing and evaluating the evidence the judge has taken into account some matter which he or she ought not to have taken into account, or failed to take into account some matter which he or she ought to have taken into account; or

(c) it unmistakenly appears from the evidence itself, or from the unsatisfactory reasons given by the judge for accepting it, that he or she cannot have taken proper advantage of his or her having seen and heard the witnesses; or

in so far aside judge has relied on manner and demeanour, there are other circumstances which indicate that the evidence of the witnesses which he or she accepted is not credible, as for instance, where those witnesses have on some collateral matter deliberately given an untrue answer.

[48] In the case of *Dato' Seri Anwar Ibrahim v. PP & Another Appeal* [2004] 3 CLJ 737 Abdul Hamid FCJ (as he then was) said at p. 752:

Clearly, an appellate court does not and should not put a brake and not going any further the moment it sees that the trial judge says that is his finding of facts. It should go further and examine the evidence and the circumstances under which that finding is made to see whether, to borrow the words of HT Ong (CJ Malaya) in *Herchun Singh*'s case (*supra*) there are substantial and compelling reasons for disagreeing with the finding." Otherwise, no judgment would ever be reversed on question of fact and the provision of s. 87 CJA 1964 that an appeal may lie not only on a question of law but also on a question of fact or on a question of mixed fact and law would be meaningless.

[49] Having scrutinised and analysed the defence's evidence according to the propounded approaches as stated above, this court was of the considered opinion that the learned judge was wrong in coming to the conclusion in the manner that he did, and thereafter to have acquitted and discharged the accused/respondent at the end of the defence case.

[50] The learned judge erred in coming to a conclusion that the money was for donation, regardless of whether it be for the Kelab Sukan or the Puspanita Club, and not for the accused/respondent against the strong totality of the whole evidence of the prosecution that had proved otherwise. What is more, in view that the presumption under s. 50(3) of Act 694 had been invoked and applied, the burden was shifted on to her to disprove otherwise, which this court opined that she had failed to do as the following reasons would show.

[51] The learned judge had made many observations as reflected in his grounds of judgments. At the end of the defence case he made several findings, *inter alia*, as follows:

[52] At p. 1026 of the appeal record the learned judge said:

[76] Mahkamah mendapati daripada keterangan saksi-saksi pembelaan bahawa jika diambil kira yuran ahli sahaja jumlahnya, adalah tidak seberapa dan tidak mencukupi untuk menampung, program-program Kelab. Dengan demikian Kelab perlu mendapatkan sumbangan daripada

orang ramai, khususnya kontraktor-kontraktor yang banyak berurusan dengan JPS. Daripada keterangan saksi-saksi tersebut, yang telah lama bekerja di JPS Machang, termasuk Jurutera Jajahan Wan Azinuddin (SP3/SD5) sendiri, mendapatkan sumbangan daripada kontraktor-kontraktor ini bukanlah satu perkara asing bagi JPS Machang. Bahkan sebelum Tertuduh datang melapor diri, kakitangan JPS Machang telah mendapatkan sumbangan, daripada kontraktor-kontraktor dan wang kutipan itu tidak terus dimasukkan ke dalam bank, tetapi dikumpul sehingga banyak baru dimasukkan. Tempoh berapa lama mereka boleh menyimpan wang sumbangan tersebut sebelum dimasukkan ke bank tidak ditentukan.

[53] At pp. 1027 of the appeal record, the learned judge said:

[77] Seterusnya tindak tanduk Tertuduh dan apa yang berlaku sehingga hari beliau ditangkap menunjukkan bahawa apa yang diceritakan oleh Tertuduh bukanlah satu rekaan. Tertuduh memang ada memberikan nombor akaun banknya kepada SP1, tetapi di atas permintaan SP1. SP1 telah menelefon Tertuduh semasa Tertuduh berada di Kuala Lumpur mengatakan beliau hendak memberikan sumbangan tersebut. Tertuduh mencadangkan supaya SP1 menghantar wang sumbangan itu ke pejabat, kerana wang itu adalah sumbangan untuk pejabat. Namun SP1 memberi alasan beliau hendak menunggu Tertuduh balik daripada Kuala Lumpur untuk menyerahkan sendiri wang itu kepada Tertuduh. Apabila Tertuduh kembali ke Kelantan daripada Kuala Lumpur, SP1 tidak jadi memberi duit itu kepada Tertuduh di pejabat Tertuduh kerana mengikutnya beliau berada di luar Kelantan. Di masa itulah SP1 meminta Tertuduh memberikan nombor akaunnya. Setelah kembali ke pejabat pada waktu petang Tertuduh telah menerima SMS daripada SP1 mengatakan wang telah dimasukkan ke dalam akaun Tertuduh. Tertuduh telah membalas SMS itu dengan mengatakan beliau tidak sempat menghantar duit itu ke pejabat, keesokan harinya beliau akan hantar.

[54] This court was of the considered opinion that a judge in exercising his judicial appreciation of the evidence must have in the forefront of his mind the very reasons for the enactment of such offending provision of which the accused had been charged.

[55] For the rationale of enacting an offence under s. 165 of the Penal Code, guidance can be derived from the following authorities by the learned authors *viz*:

In *Malal Penal Law* at p. 260, para 1651 it states:

This section is directed against the taking or receiving of valuable gifts. The taking of presents by a public servant, **when it cannot be proved that such present were corruptly taken, is rendered penal by this section** ... under this section the question of motive or reward is not material as the section prohibit the taking of a thing without consideration from a person having any connection with the official functions of the public servant.

The principle behind this section is to prevent public servant from circumventing the prohibition against taking or receiving gratification by taking or receiving valuable gift instead.

(emphasis added)

[56] In *The Indian Penal Law* of India by Dr Sir Hari Singh Gour, at p. 1151 it states:

What this section prohibits is the acceptance of a valuable present by a public servant from a present or prospective litigant or applicant, with whom he has no other connection. In other words, the acceptance of the present when traceable to a corrupt motive is what is intended to be made punishable here.

[57] *Ratanlal & Dhirajlars Law of Crimes* at p. 740 describes the applicability of s. 165 of the Penal Code thus:

Section 161 and 165 of the code are intended to keep public servants free from corruption and thus ultimately ensure purity in public life by eradicating corruption. The Court must interpret section 165 according to its plain language without in any manner being anxious or astute to narrow down its interpretation. Section 165 must be construed in a manner which would advance the remedy and suppress the mischief which is intended to be curbed.

The difference between the acceptance of a bribe made punishable under section 161 and 165 is this: under the former section the present is taken as a motive or reward for abuse of office; under the latter section the question or motive or reward is wholly immaterial and the acceptance of a valuable thing without consideration or with inadequate consideration from a person who has or is likely to have any business to be transacted, is forbidden because though not taken as motive or reward for showing any official favour, it is likely to influence the public servant to show official favour to the person giving such valuable thing - (Refer to *Nayak Rs v. Antulay* R S AIR 1986 SC 2045) pp. 2075-76.

[58] *Ratanlal & Dhirajlal's Law of Crimes* at p. 774 also said:

Section 165 is wider than section 161 and that an act of corruption not falling within section 161 may yet come within the wide terms of section 165. Section 165 is so worded as to cover cases of corruption which do not come within section 161, 162 or 163.

[59] In the case of *Kanapathy v. Regina* [1960] 1 LNS 167; [1960] MLJ 26 the court said:

... the section in its true construction makes it an offence for a public servant to accept a gift (whether palpable or disguised) from any person who is at any time been concerned in a proceeding with which the public servant has been connected.

[60] In the case of *PP v. Tan Hock Sing* [1962] 1 LNS 136; [1963] 29 MLJ 219 at p. 220 the court said:

> Therefore I am of opinion that when a police officer, in a position to do a favour to another person likely to require such a favour, received from such other any money or valuable thing without consideration or any ostensible reason, then circumstances afford reasonable and sufficient grounds for holding a sufficient case made out by the prosecution whether under section 165 of the Penal Code or section 3(b) of the Prevention of Corruption Ordinance 1950, in the absence of evidence in rebuttal.

[61] Hence, s. 165 was introduced in the Penal Code to curb and to prevent public servants from receiving any gifts without consideration from anybody who has any official dealings with that public servant. The court must interpret s. 165 according to its plain language without in any manner being anxious or astute to narrow down its interpretation. (See *Baharudin Ahmad v. PP* [2010] 3 CLJ 59; [2010] 7 MLJ 577).

[62] The learned judge should have this well-entrenched statutory proposition in the forefront of his mind when exercising the judicial appreciation of the evidence before him. Holistic, and practical approaches should be embarked in assessing the conduct of the accused in pinning her culpability, so as not to frustrate the very *raison d'etre* of this penal section. As the nation is moving towards being a developed nation, public servants are expected to be of high integrity, free of corruption and not only to possess, but to practice good governance of the highest degree. Had the learned judge held and turned over in his mind the rationale for this kind of offence, his decision would have been different.

Denial

[63] Reverting to this case before hand, it is this court's considered opinion that the main thrust of the accused/respondent's defence was a bare denial which had failed to dislodge the cogent case of the prosecution.

[64] The very first evidence that was introduced against her ie, that she gave the indent kerja (P5) and the related documents (P6) and (P7) on 14 October 2012 to SP1 was denied by her. She alleged that that it was SP7 (Kak Mun) who gave the documents as those documents were kept by SP7, and she further denied ever having made the demand of RM3,000 that transpired thereafter. In this regard, SP9 in his testimony confirmed that he saw the accused/respondent gave those documents to SP1 when SP1 came to JPS Machang to collect the same.

[65] The accused/respondent also denied that it was her who called SP1 to collect those forms against the strong and logical evidence of SP1. It was clear that her denial on this aspect of the evidence was to disassociate herself from being involved in this contract.

[66] The accused had even denied the truth of the income and expenditure statement of the Kelab Puspanita JPS Kelantan which showed a profit/ balance of RM8,602.19 (exh. P32A) even though it was confirmed and signed by the treasurer, the secretary and the two "Pemeriksa Kira-Kira" Puspanita JPS Negeri Kelantan. The accused also denied the truth of the statement of account of the Kelab for "hari inovasi" (exh. P32B) which showed a profit of RM2,525 (at p. P1123 of appeal record). The accused/ respondent also denied the truth of the statement of account of the Kelab Sukan JPS Machang which showed a balance of RM25,366.29 even though it was confirmed by the treasurer, secretary and 2 "pemeriksa kira-kira" (at p. P31 at 1115 to1117 of the appeal record).

[67] What was more telling was that the accused denied that the RM3,000 was for her, but as donation to Kelab Sukan which she alleged was in dire need of money. This was in total contradiction with the evidence of SP4, SP11 and SP10 who confirmed that the two clubs had sufficient funds as shown above to support their activities. They confirmed that at no time did the clubs ask for donations from contractors.

[68] Further, this court was of the considered opinion that as the accused/ respondent was one of the signatories to the Kelab Sukan's account, and she has the account number of the Kelab Sukan, she could have told SP1 to bank into that account. If at all it was for the club, logic dictates that she should have given the club's account number instead of her personal account number. As a public servant she should be aware of the directives, or circulars, that no public servants should take, or receive, any donations from any person, including any contractors, for him or herself, or for any club in which he or she belongs. Furthermore, she should be aware that as a public servant, the law prohibits her to receive any monies from any individuals or agencies which have any official dealings with her official work. Ignorance of the law is no excuse.

[69] This court could not believe the accused, as there were contradictions in her own evidence when she denied knowledge that she had official dealings with SP1. However, she had admitted that she knew SP1 as a contractor in Machang since the year 2010 after she reported for work on 16 April 2010 whom she admitted she met several times thereafter over issues of non-payment of work, a special project as envisaged in the photographs in D18 (at pp. 1086 to 1100 of the appeal record). In fact, it was the accused/respondent who prepared the report for the "D18" project as directed by the district engineer.

[70] Against the denial of the accused/respondent, much evidence was led by SP1 that the accused/respondent was the one who telephoned SP1 and told her that she was awarded the contract and to collect the relevant documents (exhs. P5, P6, P7). As mentioned earlier, SP1 went to JPS Machang on Sunday 14 October 2012 as instructed by the accused to collect

A those documents from the accused/respondent. SP1 further testified that it was during this time that the accused demanded the RM3,000 for herself. All these evidence were denied by the accused/respondent.

[71] However, para. 4 of exh. P5 showed the following instruction:

B > Sebelum memulakan kerja, tuan dikehendaki hadir ke pejabat ini untuk penerangan kerja oleh Pembantu Teknik, Pn. Khafasliza Binti Shafii dan En. Shamsul Mahdi bin Ismail.

[72] SP1's assertion that she met the accused to collect the three documents on that day from the accused was hence proved and that the accused/ C respondent had official dealings with SP1, the evidence of which was therefore true against the denial made by the accused. To add force to the evidence of SP1, Samsul Mahdi gave evidence as SP9 and confirmed this.

At p. 295 of appeal record, this was what SP9 said:

D > S: Berkenaan pemberian dokumen P5, P6 dan P7 ini, kamu kata Khafasliza OKT dalam kes ini yang bagi kepada Wan Zubaidah, macam mana kamu tahu?
>
> J: Dia panggil saya masuk semasa itu saya tengok ada Wan Zubaidah duduk di bilik dan dia bagi pada Wan Zubaidah."

E SP9 also testified that the accused/respondent did not inform him that she received RM3,000 from SP1 as donation to the club.

[73] Therefore to say that she did know that she had official dealings with SP1 was untenable. Hence, it was patently clear that again the accused/ respondent was not telling the truth.

F **[74]** Whilst the accused/respondent did not deny the receipt of the RM3,000, she, however, denied making the demand, instead had contended that it was for donation to the club. She denied the evidence of SP1 of making persistent demands, and instead implicated that the money was for the director of JPS, that begged another question that if at all the money was for G donation, why did she has to say that it was for the director. This in itself showed that the money was for her.

Conduct

[75] This court will now deal with the conduct of the accused/respondent. H The conduct of the accused was relevant hence admissible under s. 8 of the Evidence Act 1950 *viz*:

(a) Any fact is relevant which shows or constitute a motive or preparation for any fact in issue or relevant fact

I (b) The conduct of any party, or of any agent to any party, to any suit or proceeding in reference to that suit or proceeding, or in reference to any fact in issue therein or relevant thereto, and the conduct of any person

an offence against whom is the subject of any proceeding, is relevant if the conduct influences or is influenced by any fact in issue or relevant fact, and whether it was previous or subsequent thereto.

Illustration (i) section 8:

A is accused of a crime. The facts that after the commission of the alleged crime he absconded, or was in possession of property or the proceeds of property acquired by the crime, or attempted to conceal things which were or might have been used in committing it are relevant.

Illustration (c) s. 9:

A is accused of a crime.

The fact that soon after the commission of the crime A absconded from his house is relevant under section 8 as conduct subsequent to and affected by facts in issue. The fact that at the time when he left home he had sudden and urgent business at the place to which he went is relevant as tending to explain the fact that he left home suddenly

[76] Hence, the conduct of an accused in any crime, including in corruption cases is relevant as it can infer knowledge, intention, motive, etc and depends on the circumstances of the case, can affect the credibility of the accused and the witnesses alike, significantly.

[77] This court discerned from the conduct of the accused in not asking SP1 to bank into the Kelab Sukan account and not informing the committee members of both the Kelab Sukan or the Kelab Puspanita of the receipt of the RM3,000. This includes the evidence of the defence witnesses called by the accused/respondent who did not know that she had received the said money, as well as evidence of her colleagues who testified for the prosecution, a compelling inference that this court must draw that the money in question was actually for her as contended by SP1 and not as donation for Kelab Sukan or the Kelab Puspanita.

[78] At this juncture, the observation made by the late HRH Azlan Shah CJ (as he then was) in *PP v. Datok Hj Harun's Idris* (*infra*) is pertinent:

The manner in which the payments were made is a relevant consideration in the present case. It is evidence that the bank was asked to make them in cash. Smorthwaite said that he asked Peter Lim to find out how such payment should be made, and his answer was in cash, no receipt. That is substantiated by the evidence of payments in cash ...

Then, the 'request' for the so-called donation. That is another telling point against the accused. In ordinary circumstances, the presentation of donation, be it by way of cheque or otherwise, is preceded by certain formalities, for example, a representative of the donor firm would personally hand it to the donee at a proper place and in the presence of witnesses; not in some "back alley". I am sure that the door wants to be present to show that he is participating in whatever worthy cause the donee is undertaking, be it politics, charity, education or welfare. The donation is then properly presented and properly acknowledged.

[79] This court shared the above view that if at all the money was for donation, the very least would be that the accused/respondent will inform the committee members, or the relevant people and not suppressing it in the manner that she did. Further her allegation in telling SP1 that the money was for the director was another conduct that was a testimony of her *mala fide* act to implicate others to escape detection.

[80] Unfortunately, the conduct of the accused which reduced her credibility significantly did not attract the learned judge's attention which gave rise to a misdirection which warranted the intervention of this court.

[81] This court had made a maximum evaluation on the evidence of the prosecution by weighing them against that of the defence, by specifically scrutinising the evidence of SP1 and comparing them to the evidence of the accused/respondent and her witnesses. This court was of the considered opinion that SP1 being a credible witness her evidence were more probable than the denial of the accused whose own credibility was at stake. In fact, SP1's evidence was corroborated by the SPRM report lodged by her (exh. P8), (P5), SP2, SP3, SP4, SP9, SP10 and SP11. In addition, SP1's evidence was corroborated by the telephone conversation she had with the accused as found in the transcript (exhs. P22 & P22A), all of which evidence were corroborated by the established facts and the logics of the case itself as stated in the Federal Court case of *Brabakaran v. PP* [1965] 1 LNS 12; [1966] 1 MLJ 64.

[82] The telephone conversation confirmed that:

(i) There was a mention of the money demanded.

(ii) Contrary to what was asserted by the accused and erroneously agreed by the trial judge, the amount was actually suggested by the accused, and not SP1 herself. Further, the evidence of the amount was consistently mentioned as RM3,000, consistent with the testimony of SP1 earlier of what transpired on 14 October 2012 and the SPRM report (P8) lodged earlier by her, as can be seen from the extracts below:

Suara 1 (SP1): aaa ... duit masuk sudah … duit kerja.

Suara 2 (OKT): (kurang jelas).

Suara 1 (SP1): aaa ... Tunggu dulu ... a berapa TA ...?

Saya tidak ingat lah.

Suara 2 (OKT): Tiga.

(iii) If we could recall when she met the accused as directed on 14 October 2012 at JPS Machang to collect P5, P6, P7, it was then that the accused made the demand of RM3,000 but camouflaged it and told SP3 that the money was for the director of JPS, Kelantan. That the money was purportedly for the director was further reiterated in this telephone conversation as the following extracts of P21A & P21B will show:

Suara 1 (SP1): tiga … tidak boleh kurang ke macam mana TA.

Suara 2 (OKT): eeii (kurang jelas) Pengarah.

Suara 1 (SP1): aaaa. Pengarah minta lebih?

[83] Looking at the case in totality, this court found that the accused was not telling the truth, and that her defence was a mere denial which failed to dislodge the prosecution's case.

[84] It is to be mentioned here that the defence asserted that the Kelab Puspanita's Constitution allowed the club to collect donation from contractors. However, the Constitution was not tendered in evidence as exhibit and was not in the appeal record either.

[85] If that was true, then such Constitution would be illegal as it would contravene s. 165 of the Penal Code and could be declared illegal.

Donation As "Gratification"

[86] As a matter of fact s. 3 of Act 694 categorises a donation an offence within the meaning of the term "gratification".

[87] Section 3 of Act 694 provides:-

"gratification" means:

(a) Money, donation, gift, loan, free, reward, valuable security, property or interest in property being property of any description whether movable or immovable, financial benefit, or any other similar advantage.

[88] In the case of the *State v. Pundlik Bhikaji Ahire And Anr* AIR 1959 Bom 543, (1959) 61 BOMLR 837, 1959 Criminal Law Journal 1421 the Bombay High Court stated that:

> In its dictionary meaning, the expression "gratification" is inclusive of all satisfaction of desire or appetite, and we agree with the view of *Allahabad* High Court in *Promod Chandra Shekhar v. Rex*, that the expression is used in Section 161, Indian Penal Code, in the sense of anything which gives satisfaction to the recipient. *Prima facie*, therefore, voluntary acceptance of an amount of money or a valuable thing by a public servant will amount to acceptance of gratification.

[89] This decision further reinforced the definition that a donation is still a "gratification" as long as the recipient had official dealings with the giver which makes the recipient culpable in law. (see *PP v. Dato' Harun Idris (No. 2)* [1976] 1 LNS 184; [1977] 1 MLJ 15).

[90] Hence, the learned judge was in error when he failed to direct his mind to this facts which amounted to a misdirection that warranted this court's intervention.

[91] For completeness, this court would like to address the issue of witnesses in the trial. It is not uncommon, particularly in corruption cases, for witnesses called by the prosecution, who are either peers, or superiors of the accused to give evidence in favour of the accused. The approach taken by the courts should be a liberal approach as in the Court of Appeal's case of *Lim Guan Eng v. PP & Other Appeals* [1998] 3 CLJ 769; [1998] 3 MLJ 14 as adopted from the corruption case in *Haji Abdul Ghani Ishak & Anor v. PP* [1981] 1 LNS 96; [1981] 2 MLJ 230 at p. 47 where the Court of Appeal said:

> The Public Prosecutor is often compelled to call witnesses to formally establish facts that are necessary for the unfolding of the story that lies at the heart of his case. Some of these witnesses may, by reason of close relationship or loyalty, exhibit a natural bias in favour of the accused. They may, out of eagerness to help the accused, furnish answers under cross-examination that are favourable to the defence and stretch the truth to the point of incredulity. If the general rule is applied with unbending strictness in such cases, substantial justice will not be achieved. The approach that is to be adopted by a trial court in such cases appears in the judgment of Wan Yahya J (as he then was) in *Haji Abdul Ghani bin Ishak & Anor v. PP* [1981] 2 MLJ 230 ...".

[92] This court had adopted the same approach where applicable and was fully satisfied that the evidence of the prosecution witnesses were credible and reliable.

[93] Regarding SP1, this court found her to be a credible and truthful witness, and by virtue of s. 52(1) of Act 694, SP1 could not be treated as an accomplice. She was not a willing participant. That was the reason why she reported to MACC. Hence her evidence need not be corroborated (see *Mohd Khir Toyo v. PP* [2015] 8 CLJ 769, Federal Court). Nevertheless, this court was satisfied and had made a finding that all her evidence were well-corroborated, particularly through the evidence of the tele-conversation transcripts (exhs. P21A & P21B), P5, as well as by the evidence of SP2, SP3, SP4, SP9, SP10 and SP11 and the entire proven facts of the case itself as alluded to earlier. There might be some discrepancies but these are minor which did not undermine the prosecution's case, as human fallibility in observation, retention and recollection are often recognized by the court (see *Yan Wing Lee v. PP* [1994] 2 CLJ 453 and *PP v. Datuk Haji Harun Idris (supra)*.

[94] Regarding the accused/appellant, it had to be reiterated that, looking at the totality of evidence of the prosecution and the defence, this court found the Accused as not a credible, hence, not a truthful witness. This court also found that the excuse given by the accused that she will send the money received the next day to the office was actually a decoy and camouflage to avoid detection and from being implicated. Had she not been arrested, the money would still have been in her account.

[95] In the final analysis, this court found that the defence had failed to rebut the presumption, on a balance of probabilities, that she had accepted the money without consideration, with full knowledge of the circumstances as set out in the charge against her. Even if the lesser burden were to be used, the accused had failed to raise a reasonable doubt on the prosecution's case as the defence was a mere denial, with some afterthoughts evidence. In spite of the defence calling ten witnesses, this court had arrived at this conclusion by upholding the proposition that evidence are to be weighed, and not measured. Accordingly, this court found her guilty and convicted her. The decision of the learned session's judge was accordingly set aside.

Sentence

[96] In meting out sentences, this court is guided by certain sentencing principles, of which the public interest is of paramount importance over that of the private interest of the accused (see *R v. Ball* 35 CR App 164) and *Loo Choon Fatt* [1976] 1 LNS 102; [1976] 2 MLJ 256. However, the interest of the accused should not be disregarded [see *Tan Sri Abdul Rahim Mohd Noor lwn. PP* [2001] 1 CLJ 645; [2001] 1 MLJ 193. There are circumstances in which public interest warrants that the accused should not be put behind bars for far too long, as that will do more harm than good for example they might become hard core criminal. Hence, this court needed to strike a balance in order to do justice to the accused as well as to the public.

[97] In cases of corruption though, it is important to impose a deterrent sentence to reflect the severity of the offence. In the words of Justice Abdul Malik Ishak of the High Court as he then was in the case of *Hamidun bin Mat Yatim*, "corrupt Government servants should be sentenced severely as examples to others and also to protect the image of the Government service".

[98] This is particularly true as this court had indicated earlier that as this country is moving towards a developed nation status, public servants are expected to be of high integrity and free from corruption and to practise good governance.

[99] In the case of *PP v. Dato Waad Mansor* [2005] 1 CLJ 421, the Federal Court said:-

> Thus, we feel that the sentences imposed for offences of corruption should be deterrent in nature so as to reflect the gravity of the offences.
>
> ... there is no doubt that in cases involving corruption, imprisonment would be a proper sentence unless there are extenuating circumstances against the imposition of such a sentence.

[100] This court had embarked on a fair balancing exercise, balancing the public interest, the seriousness of the offence, with the fact that the accused/respondent is a wife, a mother of college and school-going children, and that she had no previous conviction. This court also had considered the amount of money involved was only RM3,000, and that she would lose her job due to this conviction recorded against her.

[101] Hence, this court was of the considered opinion that neither a bound over for good behaviour under s. 173A CPC, nor a long custodial sentence should be the option.

[102] In the upshot, this court sentenced the accused/respondent to one week imprisonment with a fine of RM15,000 in default eight months imprisonment.

Conclusion

[103] In conclusion, the appeal of the Public Prosecutor was allowed. The decision of the learned Sessions Judge was accordingly set aside.